

Court of Appeals, State of Michigan

ORDER

Colette Nunn v Flint Housing Comm

Docket No. 264262

LC No. 04-079500-CL

Patrick M. Meter
Presiding Judge

William C. Whitbeck, CJ

Bill Schuette
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the motion requesting that there shall be no stay of trial court proceedings per MCR 7.209(E)(4) is DENIED.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 14 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

COLETTE NUNN and REDONNA CLEMENTS,

Plaintiffs-Appellees,

v

FLINT HOUSING COMMISSION,

Defendant-Appellant.

UNPUBLISHED
February 14, 2006

No. 264262
Genesee Circuit Court
LC No. 04-079500-CL

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals as of right from the circuit court's order denying its motion for summary disposition premised on governmental liability. We reverse and remand for entry of summary disposition in favor of defendant. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

I. FACTS

Defendant is an municipal body established by the City of Flint by ordinance. Plaintiffs, former employees of defendant, filed suit asserting that defendant's agents pressured them to wrongfully evict one of defendant's tenants, and that in retaliation for their refusal to do so, defendant refused to rehire them in the course of a general restructuring. Plaintiffs attributed the wrongful conduct primarily to defendant's executive director, but chose to name as defendant only the Commission itself.¹

In denying defendant's motion for summary disposition, the trial court stated:

Now, defense . . . brings this motion because they are saying that he gave illegal instructions and that's not within the scope of his authority. . . . I have to reject the motion because to say that he was acting illegally, means that the agency is always immune from liability. And while the law does grant broad

¹ We note that the plaintiff has since added Kenneth Crutcher, the Commission's executive director as a defendant in this case. This, however, does not affect this Court's analysis.

governmental immunity, there are exceptions to that and in those exceptions, they're closed, if one can argue that it was an improper illegal act by the agency.

II. STANDARD OF REVIEW

MCR 2.116(C)(7) authorizes motions for summary disposition premised upon immunity granted by law. When deciding a motion under that rule, the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. See *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

III. ANALYSIS

Governmental agencies in this state are generally immune from tort liability for actions taken in furtherance of governmental functions. MCL 691.1407(1). A governmental function is statutorily defined as “an activity . . . expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” MCL 691.1401(f).

Plaintiffs assert that defendant's status as a governmental entity was not decided below, and thus that that question is not properly before this Court. However, plaintiffs failed to raise the issue of the defendant's status in the trial court, and thereby waived the issue. See *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003) (Issues first raised on appeal need not be considered by this Court). Furthermore, in their complaint, plaintiffs themselves described defendant as “an entity . . . organized under the laws of the State of Michigan.” The formation of the Flint Housing Commission by a City of Flint resolution renders it a “political subdivision” for purposes of the Act. Consequently, even if the issue were to be considered by this Court, the defendant's status falls under the category of a political subdivision as defined under the Governmental Immunity Act.²

The question, then, is whether the trial court erred in failing to conclude, as a matter of law, that defendant was immune from any liability stemming from its executive director's having pressured plaintiffs to use their positions to evict a tenant in violation of applicable law, and then using the general restructuring to retaliate against them by refusing to rehire them. We conclude that the trial court erred in failing to recognize defendant's immunity.

² Under the Act a “[g]overnmental agency” means the state or a political subdivision.” MCL 691.1401(d). “‘Political subdivision’ means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 2 or more political divisions; or an agency, department, court, board or council of a political subdivision.” MCL 691.1401(b).

Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception. The agency is vicariously liable in these situations because it is in effect furthering its own interests or performing activities for which liability has been statutorily imposed. However, if the activity in which the tortfeasor was engaged at the time the tort was committed constituted the exercise or discharge of a governmental function (*i.e.*, the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune pursuant to § 7 of the governmental immunity act. [*Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 641 (1984).]

See also *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002).

Plaintiffs do not assert that defendant, or its agent, in deciding whom to rehire, were engaging in a propriety function.³ Nor do plaintiffs allege discrimination in violation of the Civil Rights Act.⁴ The only statutory basis for their claim is their assertion that defendant's executive director's conduct constituted gross negligence, thus invoking the exception to immunity set forth in MCL 691.1407(2)(c). But that provision subjects a state agent, or individual, to liability for gross negligence, not a state agency.⁵ Plaintiffs otherwise rely on public policy as the basis for their claim for damages over having been not rehired in the course of defendant's reorganization.

In general, "either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich

³ A proprietary function is "any activity . . . conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413.

⁴ MCL 37.2101 *et seq.*

⁵ MCL 691.1407(2)(c) provides that "without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if . . . [t]he officer's employee's members' or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

692, 695; 316 NW2d 710 (1982). But an exception exists “based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.” *Id.* Normally such public policy is spelled out legislatively, but sometimes courts recognize “sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges.” *Id.* Accordingly, a cause of action for wrongful discharge may lie where the employee was terminated because of “the failure or refusal to violate a law in the course of employment,” or where termination was retaliation for “the employee’s exercise of a right conferred by a well-established legislative enactment.” *Id.* at 695-696.

Plaintiffs assert that they were not rehired because they had refused to violate the law at defendant’s executive director’s urging. Assuming the truth of their allegations, as is appropriate on a (C)(7) motion, *Amburgey, supra*, plaintiffs do indeed assert an injury for which the law may provide a remedy. The actionable conduct was not the pressuring of plaintiffs to unlawfully evict a tenant, but rather the retaliatory refusal to rehire them. An agency making hiring decisions for purposes of engaging staff to carry out its governmental function is obviously thereby acting in its governmental capacity.

However, because only public policy, not statute, recognizes termination for refusal to break the law as an actionable tort, and because that tort thus is not among the statutory exceptions to governmental immunity, an adverse hiring decision in violation of public policy is not actionable against a governmental agency. *Mack, supra; Ross, supra.*

Moreover, a governmental entity cannot be held liable for the intentional torts of its employees. See *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995). Retaliatory discharge, or refusal to rehire, in violation of public policy is obviously intentional conduct. Accordingly, it is not actionable against defendant, the alleged wrongdoer’s governmental employer.

For these reasons, we conclude that the trial court erred in failing to hold that defendant was entitled to governmental immunity. We reverse the judgment below, and remand this case for entry of summary disposition in favor of defendant.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette